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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

BRIAN S. GOLDSTEIN, Plaintiff and Respondent, v. THOMAS DALE & ASSOCIATES, LTD., Defendant and Appellant.	B282274 (Los Angeles County Super. Ct. No. LC104771)

APPEAL from an order of the Superior Court of Los Angeles County, Rupert A. Byrdsong, Judge. Affirmed.

Manning & Kass, Ellrod, Ramirez, Trester and Scott Wm. Davenport for Defendant and Appellant.

Law Offices of David Queen and David D. Queen for Plaintiff and Respondent.

Defendant Thomas Dale & Associates, Ltd. (TDA) appeals from an order denying its special motion to strike (Code Civ. Proc., § 425.16; anti-SLAPP statute)[1] a complaint for damages filed by Brian S. Goldstein. Goldstein's complaint alleged causes of action for stalking and harassment. TDA contends the complaint arose from protected activity under section 425.16, and Goldstein failed to demonstrate a probability of prevailing on his claims. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Complaint*

On October 18, 2016 Goldstein filed a verified complaint for damages against TDA and five Doe defendants alleging causes of action for stalking and harassment. The complaint alleged on a date in late March or early April 2016 TDA was hired by an unknown client "believed to be involved in unlawful activities." The complaint alleged TDA hired licensed private investigator Edward Swihart and others to investigate the operations of Goldstein and his pharmaceutical business, RX Unlimited LLC.

The complaint further alleged on or about April 28, 2016 Goldstein observed a man photographing vehicles and their contents in Goldstein's company parking lot. The man fled by car when approached by one of Goldstein's employees, but the employee saw the man's license plate number. Goldstein hired a licensed private investigator, who determined Swihart was the

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[1] All statutory references are to the Code of Civil Procedure. SLAPP is an acronym for "strategic lawsuits against public participation." (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1060.)

owner of the fleeing vehicle. Goldstein's investigator later confronted Swihart. Swihart admitted he was hired by TDA to investigate Goldstein. Swihart did not reveal the identity of TDA's client, but told Goldstein's investigator the client was "mafia-related." The complaint alleged Swihart was acting in coordination with others, conducting "a vast investigation" for unlawful purposes on behalf of TDA and its client.

The complaint alleged Goldstein was later followed home from work in the late evening by individuals believed to be working for TDA. Goldstein's investigator also observed "multiple vehicles" parked outside Goldstein's gated residential community. The drivers of the vehicles were communicating with one another.

B. *TDA's Special Motion to Strike*

On December 19, 2016 TDA filed a special motion to strike the complaint under section 425.16. In support of its motion, TDA filed declarations from its office manager Sisley Brunon and its attorney Scott Wm. Davenport. TDA stated in its motion that it had been retained to conduct a sub-rosa investigation of Goldstein "in connection with forthcoming litigation." The identity of TDA's client and the nature of the anticipated litigation "remain[ed] confidential." TDA acknowledged subcontracting with Swihart to conduct the investigation.

TDA argued that because the conduct alleged in the complaint was undertaken in preparation for a future lawsuit, Goldstein's claims arose from protected activity in furtherance of TDA's right of petition. TDA further contended Goldstein would not be able to proffer admissible evidence establishing a probability of prevailing on his claims.

Goldstein opposed the motion, arguing his causes of action did not arise out of actions taken by TDA in furtherance of any protected activity, and that TDA had failed to show its conduct involved a public issue or issue of public interest under section 425.16, subdivision (e)(3) or (4).

At a hearing on April 12, 2017 the trial court denied TDA's motion. It is not clear from the record if the trial court found TDA had not met its initial burden to show Goldstein's causes of action arose from conduct in furtherance of TDA's protected activity, or whether it concluded Goldstein had shown a probability of prevailing on the claims against TDA.[2] The court stated, "This goes beyond a simple description of this is a sub-rosa investigation. . . . You can't win, you can't fight it. It just means that this case is going forward." TDA timely appealed.

DISCUSSION

A. *The Law Governing Special Motions To Strike*

A cause of action arising from an act in furtherance of the defendant's constitutional right of petition or free speech in connection with a public issue is subject to a special motion to strike unless the plaintiff demonstrates a probability of prevailing on the claim. (§ 425.16, subd. (b)(1); *Barry v. State Bar of California* (2017) 2 Cal.5th 318, 321 (*Barry*).)

An "'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: (1) any written or oral

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[2] TDA also filed a motion to strike allegations related to Goldstein's request for punitive damages. The trial court's denial of this motion is not before us.

statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e).)

The analysis of an anti-SLAPP motion involves a two-step process. (*Barry*, *supra*, 2 Cal.5th at p. 321.) ""First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one 'arising from' protected activity. [Citation.] If the court finds such a showing has been made, it then must consider whether the plaintiff has demonstrated a probability of prevailing on the claim.'" [Citations.] . . . "'Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute . . . is a SLAPP, subject to being stricken under the statute.'"" (*Ibid*.)

We review de novo the grant or denial of a special motion to strike. (*Park v. Board of Trustees of California State University*, *supra*, 2 Cal.5th at p. 1067 (*Park*).) "We exercise independent judgment in determining whether, based on our own review of the record, the challenged claims arise from protected activity. [Citations.] In addition to the pleadings, we may consider affidavits concerning the facts upon which liability is based. [Citations.] We do not, however, weigh the evidence, but accept

the plaintiff's submissions as true and consider only whether any contrary evidence from the defendant establishes its entitlement to prevail as a matter of law." (*Ibid*.)

B. *TDA Failed To Carry Its Burden To Show Goldstein's Causes of Action Arose From Protected Activity*

"A claim arises from protected activity when that activity underlies or forms the basis for the claim." (*Park*, *supra*, 2 Cal.5th at p. 1062; accord, *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78.) "'[T]he mere fact that an action was filed after protected activity took place does not mean the action arose from that activity for the purposes of the anti-SLAPP statute.'" (*Park*, at p. 1063.) "Instead, the focus is on determining what 'the defendant's activity [is] that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning.' [Citation.] 'The only means specified in section 425.16 by which a moving defendant can satisfy the ["arising from"] requirement is to demonstrate that the defendant's conduct by which [the] plaintiff claims to have been injured falls within one of the four categories described in subdivision (e) . . . .' [Citation.] In short, in ruling on an anti-SLAPP motion, courts should consider the elements of the challenged claim and what actions by the defendant supply those elements and consequently form the basis for liability." (*Ibid*., italics omitted.)

TDA argues the conduct giving rise to Goldstein's harassment and stalking claims was part of an investigation in anticipation of future litigation by its confidential client. It contends its actions in support of a potential lawsuit are therefore protected activity under section 425.26, subdivision (e)(2), because they were taken "in connection with an issue

under consideration or review by a legislative, executive, or judicial body."

However, section 425.16, subdivision (e)(2), as well as subdivision (e)(1) and (3), expressly apply only to "written or oral statement[s] or writing[s]." The complaint does not allege, nor does TDA argue, that the alleged stalking and harassment included written or oral statements or writings. Thus, TDA could only succeed on its motion if it made a showing under section 425.16, subdivision (e)(4), which applies to "any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest."

The challenge for TDA, however, is that subdivision (e)(4) requires that for TDA's conduct to qualify as protected activity, TDA must show a "connection with a public issue or an issue of public interest." (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1123 [concluding Legislature did not intend that § 425.16, subd. (e)(1) & (2), include "an 'issue of public interest' limitation," where Legislature expressly included the requirement only in subd. (e)(3) & (4)]; *Weinberg v. Feisel* (2003) 110 Cal.App.4th 1122, 1132 ["[T]he third and fourth categories of conduct that fall within section 425.16[, subdivision (e)] are subject to the limitation that the conduct must be in connection with an issue of public interest. The Legislature intended this requirement to have a limiting effect on the types of conduct that come within the third and fourth categories of the statute."].)

TDA did not argue in the trial court, nor has it argued on appeal, that its investigation related to a public issue or an issue of public interest. Instead, it contends in its briefing on appeal that section 425.16, subdivision (e)(2), applies to its conduct

because its actions were "premised on forthcoming litigation," and under subdivision (e)(2) TDA need not show the conduct was related to an issue of public interest. For this proposition TDA relies on *Comstock v. Aber* (2012) 212 Cal.App.4th 931, *Digerati Holdings, LLC v. Young Money Entertainment, LLC* (2011) 194 Cal.App.4th 873, and *CKE Restaurants, Inc. v. Moore* (2008) 159 Cal.App.4th 262. These cases are distinguishable in that each involved "written or oral statement[s]" related to an anticipated judicial proceeding, bringing the communications under section 425.16, subdivision (e)(1) or (2). (See *Comstock*, at pp. 941, 944-945 [reports of sexual assault and harassment to police, nurse, and human resources manager came within § 425.16, subd. (e)(1) & (2), as reports to law enforcement and "statements prior to litigation"]; *Digerati*, at pp. 878-888 [communications by musician's attorney to production company regarding disputed documentary film were prelitigation statements made in furtherance of the musician's right of petition under § 425.16, subd. (e)(2)]; *CKE Restaurants*, at pp. 265-267, 271 [plaintiff's suit for declaratory relief "arose *entirely*" from defendants' filing of intent-to-sue notice under Safe Drinking Water and Toxic Enforcement Act of 1986].)

TDA has failed to cite to any authority, nor can it, for why its alleged conduct would qualify as protected activity under subdivision (e)(2), absent the making of written or oral statements. In reaching our conclusion TDA's conduct does not fall within subdivision (e)(2), we give effect to the distinction the Legislature made between "written or oral statement[s]" in subdivision (e)(1), (2), and (3), and "other conduct" in subdivision (e)(4). (See *Rea v. Blue Shield of California* (2014) 226 Cal.App.4th 1209, 1225 ["Where the Legislature makes express

statutory distinctions, we must presume it did so deliberately, giving effect to the distinctions, unless the whole scheme reveals the distinction is unintended."]; *Metropolitan Water Dist. v. Superior Court* (2004) 32 Cal.4th 491, 502 [same].)

Because TDA has failed to demonstrate its conduct related to a public issue or issue of public interest, TDA has not carried its burden under the first prong of the anti-SLAPP analysis. (See *Weinberg v. Feisel*, *supra*, 110 Cal.App.4th at p. 1134 [affirming denial of motion to strike claims for libel, slander, and intentional infliction of emotional distress where defendant failed to show dispute between rare coin collectors related to a matter of public interest]; *Rivero, supra*, 105 Cal.App.4th at pp. 924-925 [affirming denial of anti-SLAPP motion because statements by labor union concerning supervisor's workplace misconduct did not relate to a public issue or matter of public interest]).[3]

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[3] On January 18, 2019 TDA filed a request for judicial notice of "the filing of a litigation which was referred to repeatedly in the briefing by the parties," attaching an August 1, 2017 complaint against Goldstein, his company, and others. Because TDA has not argued that the litigation is related to the alleged harassing conduct or relates to a public issue or issue of public interest, we deny the request as unnecessary to our resolution of this appeal. (See *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 748, fn. 6 [judicial notice denied where "the requests present no issue for which judicial notice of these items is necessary, helpful, or relevant"]; *Appel v. Superior Court* (2013) 214 Cal.App.4th 329, 342, fn. 6 [judicial notice denied where materials are not "relevant or necessary" to the court's analysis].)

DISPOSITION

The order denying the special motion to strike is affirmed. Goldstein is to recover his costs on appeal.

FEUER, J.

WE CONCUR:

PERLUSS, P. J.

SEGAL, J.